

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TRIVERS ARTHUR GREENE,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

2:07-cv-0304-RLH-GWF

ORDER

In this capital habeas corpus action, there are, before the court for decision, a motion to dismiss (docket #28) filed by the respondents, and a motion for stay and abeyance (docket #65) and motion for leave to conduct discovery (docket #52) filed by the petitioner. The court will deny the respondents' motion to dismiss and the petitioner's discovery motion, and will grant the motion for stay and abeyance, and stay this action pending the conclusion of pending state-court habeas proceedings.

This habeas corpus action is brought pursuant to 28 U.S.C. § 2254, by Travers Arthur Greene, a Nevada prisoner sentenced to death. Petitioner's conviction and death sentence result from the shooting and killing of two people near Las Vegas on September 23, 1994. Petitioner was found guilty and sentenced to death following a jury trial, which was conducted in September and October 1995. The judgment of conviction was entered December 12, 1995.

1 Petitioner appealed to the Nevada Supreme Court, and that court affirmed on
2 January 4, 1997. *Greene v. State*, 113 Nev. 157, 931 P.2d 54 (1997). Petitioner then pursued a
3 habeas petition in state court. That petition was ultimately unsuccessful. The Nevada Supreme Court
4 affirmed its denial on November 14, 2006. Subsequently, on February 28, 2008, petitioner initiated
5 a second state-court habeas petition. That action remains pending.

6 Meanwhile, this court received from petitioner a *pro se* habeas corpus petition (docket
7 #1), initiating this action, on March 9, 2007. The court appointed counsel for petitioner (docket #4,
8 #7). On February 6, 2008, petitioner filed an amended petition for writ of habeas corpus (docket
9 #16). The amended petition includes 17 grounds for relief. According to the parties, the amended
10 petition in this action is essentially identical to the petition pending in state court.

11 On July 1, 2008, respondents filed their motion to dismiss (docket #28). In that
12 motion, respondents argue that all the claims in the amended petition except one – Ground 9 – are
13 unexhausted in state court.

14 On July 31, 2008, petitioner filed an opposition to the motion to dismiss, along with a
15 motion for stay and abeyance and a motion for leave to conduct discovery (docket #51, #52, #65).
16 Petitioner contends that all but four of his claims – Grounds 3, 10, 14, and 16 – are exhausted.
17 Petitioner argues that respondents are judicially and equitably estopped from taking the position that
18 several of his claims are not exhausted. Petitioner argues that he should be excused from exhausting
19 the factual bases of certain of his claim due to alleged inadequacy of state corrective process. And,
20 petitioner argues that the court should stay this case pending completion of the pending state-court
21 habeas proceeding.

22 On December 5, 2008, respondents filed a reply in support of their motion to dismiss
23 and an opposition to petitioner's motion for stay and abeyance (docket #73), as well as an opposition
24 to petitioner's discovery motion (docket #74). On December 19, 2008, petitioner filed a reply in
25 support of his motion for stay and abeyance (docket #75) and a reply in support of his discovery
26 motion (docket #76).

1 A federal court may not grant habeas corpus relief on a claim not exhausted in state
2 court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity,
3 and is intended to allow state courts the initial opportunity to correct constitutional deprivations. *See*
4 *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the
5 claim to the highest state court, and must give that court the opportunity to address and resolve it.
6 *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,
7 10 (1992).

8 It is plain that the amended petition in this action is a mixed petition – meaning that it
9 contains both exhausted and unexhausted claims. While the parties disagree about the exhaustion of
10 many of the claims in the amended petition, the parties agree that Grounds 3, 10, 14, and 16 are
11 unexhausted. *See* Amended Petition (docket #16), p. 3.

12 Petitioner requests that this action be stayed while he completes the exhaustion of all
13 his claims in state court; he argues – correctly – that, if his mixed amended petition is dismissed
14 without prejudice, as requested by respondents, he may face limitations issues when he attempts
15 to file a new federal petition after exhausting his claims in state court. This is because of the
16 well-settled rule that the pendency of a federal habeas petition does not result in statutory tolling of
17 the applicable one-year limitations period. *See* 28 U.S.C. § 2244(d) (one year limitations period);
18 *Duncan v. Walker*, 533 U.S. 167 (2001) (pendency of federal habeas petition does not toll limitations
19 period); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (regarding “protective petitions”).
20 If this case were simply dismissed at this point, the statute of limitations might bar petitioner from
21 filing a new federal habeas petition.

22 In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court
23 circumscribed the discretion of the federal district courts to impose stays to facilitate habeas
24 petitioners’ exhaustion of claims in state court. The *Rhines* Court stated:

25 [S]tay and abeyance should be available only in limited circumstances.
26 Because granting a stay effectively excuses a petitioner's failure to
present his claims first to the state courts, stay and abeyance is only
appropriate when the district court determines there was good cause

1 for the petitioner's failure to exhaust his claims first in state court.
 2 Moreover, even if a petitioner had good cause for that failure, the
 3 district court would abuse its discretion if it were to grant him a stay
 4 when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C.
 § 2254(b)(2) ("An application for a writ of habeas corpus may be
 denied on the merits, notwithstanding the failure of the applicant to
 exhaust the remedies available in the courts of the State").

5 * * *

6 [I]t likely would be an abuse of discretion for a district court to deny a
 7 stay and to dismiss a mixed petition if the petitioner had good cause
 8 for his failure to exhaust, his unexhausted claims are potentially
 9 meritorious, and there is no indication that the petitioner engaged in
 intentionally dilatory litigation tactics. In such circumstances, the
 district court should stay, rather than dismiss, the mixed petition.

10 *Rhines*, 544 U.S. at 277-78.

11 *Rhines* does not state or suggest that every unexhausted claim in the petition must
 12 satisfy, individually, the "good cause" and "potentially meritorious" requirements before a stay will
 13 be permitted. Indeed, the rationale for permitting a stay would apply with more force to a petition in
 14 which only one of the unexhausted claims meets the *Rhines* requirements, but is likely meritorious,
 15 than it would to a petition in which all the unexhausted claims meet the *Rhines* requirements, but
 16 none are more than potentially meritorious. Therefore, the efficient approach is for the court to
 17 address petitioner's motion for stay and abeyance before reaching respondents' exhaustion
 18 arguments as to each individual claim. If a stay is warranted with respect to any single claim, the
 19 court need not conduct a claim-by-claim exhaustion analysis regarding the remaining claims.

20 In Ground 3, petitioner alleges that "the State failed to disclose material exculpatory
 21 and impeachment information." *See* Amended Petition, p. 107, lines 8-9; *see also, generally, id.*
 22 pp. 107-10. Specifically, petitioner asserts that the State did not disclose information about benefits
 23 that were allegedly conferred upon witness Anthony Fisher in exchange for his testimony at the guilt
 24 phase of petitioner's trial. *See* Amended Petition, pp. 107-10. Fisher was a prosecution witness who
 25 testified that petitioner confessed to him that he was responsible for the September 23, 1994,
 26 killings. According to petitioner, when Fisher testified, there were, pending against him, charges of

1 manufacturing and trafficking a controlled substance, as well as child endangerment, and the State
2 did not disclose those pending charges to petitioner's counsel, and did not elicit information about
3 them at trial. Also according to petitioner, the State failed to disclose to petitioner's counsel benefits
4 that Fisher had received, and benefits he anticipated receiving, vis-a-vis the charges against him, in
5 return for his testimony at petitioner's trial.

6 Petitioner suggests that the State's concealment of evidence supporting this claim
7 delayed his ability to pursue the claim, and is good cause for his failure to exhaust this claim in
8 state court. Respondents did not respond at all to this argument.

9 The court finds good cause for petitioner's failure to exhaust Ground 3, in his
10 uncontested assertion that the State's concealment of evidence affected his ability to proffer this
11 claim in state court. Furthermore, the court finds that Ground 3 is potentially meritorious, and there
12 is no indication that petitioner engaged in intentionally dilatory litigation tactics. Therefore, the
13 court finds that, with respect to Ground 3, petitioner qualifies for a stay under *Rhines*.

14 Moreover, respondents concede that petitioner has shown good cause for failing to
15 exhaust Ground 6, because of changes in the law since the final resolution of his first state habeas
16 petition. *See* Respondents' Reply to Opposition to Motion to Dismiss and Opposition to Counter-
17 Motion for Stay and Abeyance (docket #73), p. 8. Respondents recognize that petitioner's claim in
18 Ground 6 is based in large part on the decision in *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007),
19 which was rendered after the conclusion of petitioner's first round of state habeas proceedings.
20 The Nevada Supreme Court affirmed the denial of petitioner's first state habeas petition on
21 November 14, 2006. Furthermore, here again, the court finds that the claim in Ground 6 is not
22 plainly meritless and there is no indication that the petitioner engaged in intentionally dilatory
23 litigation tactics.

24 Thus, the court finds that petitioner has met the standard for a stay under *Rhines*.
25 The court will deny respondents' motion to dismiss, will grant petitioner's motion for stay and
26

1 abeyance, and will stay this action so that petitioner may complete his pending state-court habeas
2 action, and fully exhaust all his unexhausted claims.

3 The court's intention is that this will be the only time that the court imposes a stay to
4 allow petitioner to exhaust claims in state court. Petitioner must exhaust *all* of his unexhausted
5 claims in state court during the stay of the action imposed pursuant to this order.

6 Concomitantly, the court will deny petitioner's discovery motion. Rule 6 of the Rules
7 Governing Section 2254 Cases in the United States District Courts states: "A party shall be entitled
8 to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to
9 the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to
10 do so, but not otherwise." The Supreme Court has held that if through "specific allegations before
11 the court," the petitioner can "show reason to believe that the petitioner may, if the facts are fully
12 developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide
13 the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899,
14 908-09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). The Ninth Circuit Court of
15 Appeals has pointed out that "[a] habeas petitioner does not enjoy the presumptive entitlement to
16 discovery of a traditional civil litigant." *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999)
17 (citing *Bracy*, 520 U.S. at 903-05). "Rather, discovery is available only in the discretion of the court
18 and for good cause shown..." *Id.* The court instructed:

19 Habeas is an important safeguard whose goal is to correct real and
20 obvious wrongs. It was never meant to be a fishing expedition for
habeas petitioners to "explore their case in search of its existence."

21 *Rich*, 187 F.3d at 1067.

22 In determining whether there is good cause for discovery, within the meaning of
23 Rule 6 and *Bracy*, the court takes into consideration whether the claims upon which the petitioner
24 wishes to conduct discovery have been exhausted in state court; this is because habeas corpus relief
25 usually cannot be granted upon unexhausted claims. *See* 28 U.S.C. § 2254(b); *see also Calderon v.*
26 *United States District Court (Hill)*, 120 F.3d 927 (9th Cir. 1997); *Calderon v. United States District*

1 *Court (Roberts)*, 113 F.3d 149 (9th Cir. 1997); *Calderon v. United States District Court (Nicolaus)*,
2 98 F.3d 1102 (9th Cir. 1996), *cert. denied*, 520 U.S. 1233 (1997).

3 In this case, a substantial portion of the discovery requested by petitioner pertains to
4 claims that petitioner concedes are not yet exhausted in state court. *See* Motion for Leave to
5 Conduct Discovery (docket #52), pp. 16-30. These same claims are pending in state court, and, as is
6 discussed above, this case will be stayed pending the completion of that state-court litigation.

7 According to respondents, petitioner has filed an identical discovery motion in the
8 state-court action. *See* Opposition to Motion for Leave to Conduct Discovery (docket #74), pp. 4-5.
9 That is the appropriate forum for petitioner's discovery request, at least in the first instance. *See*
10 *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("The state court is the appropriate forum for
11 resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding
12 to later federal-court proceedings can only degrade the accuracy and efficiency of judicial
13 proceedings.").

14 Under these circumstances, in the interests of federal-state comity and judicial
15 economy, the court will deny petitioner's discovery motion.

16 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (docket #28)
17 is **DENIED**.

18 **IT IS FURTHER ORDERED** that petitioner's Motion for Leave to Conduct
19 Discovery (docket #52) is **DENIED**.

20 **IT IS FURTHER ORDERED** that petitioner's Motion for Stay and Abeyance
21 (docket #65) is **GRANTED**. This action is **STAYED** to allow petitioner to exhaust, in state court,
22 his unexhausted claims for habeas corpus relief.

23 **IT IS FURTHER ORDERED** that, on or before **June 15, 2009**, petitioner shall file
24 and serve a status report, describing the status of his state-court proceedings. Thereafter, during
25 the stay of this action, petitioner shall file such a status report every six months (on or before
26 December 15, 2009; June 15, 2010, etc.). Respondents may, if necessary, file and serve a response

1 to any such status report within 15 days after its service. If necessary, petitioner may reply within 15
2 days of service of the response.

3 **IT IS FURTHER ORDERED** that, following the conclusion of petitioner's
4 state-court proceedings, petitioner shall, within **30 days**, make a motion to administratively reopen
5 this case and lift the stay.

6 **IT IS FURTHER ORDERED** that this action shall be subject to dismissal upon a
7 motion by respondents if petitioner does not comply with the time limits in this order, or if he
8 otherwise fails to proceed with diligence during the stay imposed pursuant to this order.

9 **IT IS FURTHER ORDERED** that, absent extraordinary circumstances, this will be
10 the final opportunity that this court provides to petitioner to return to state court to exhaust claims for
11 habeas corpus relief.

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13 Dated this 6th day of February 2009.

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16 CHIEF UNITED STATES DISTRICT JUDGE
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